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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 517

WALTER M. HORT, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The Government does not oppose the issuance of a writ in this case, but suggests that, if granted, it be limited to the first question presented in the petition.

1. The first question presented is whether, upon cancellation of a lease of real property, the lessor may deduct as a loss under Section 23 (e) of the Revenue Act of 1932 the difference, if any, between the value of the lease and the consideration received for its cancellation. The court below, relying on its own earlier decision in *Warren Service Corp.* v.

Commissioner, 110 F. (2d) 723, held that the lessor may not take such a deduction because a loss of prospective income is not a loss of property for income-tax purposes. Although we believe this decision to be plainly correct, it is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Commissioner* v. *Langwell Real Estate Corp.,* 47 F. (2d) 841.

2. The second question presented in the petition is whether, in the circumstances of this case, the court below erred in refusing to remand the case to the Board of Tax Appeals for a rehearing upon an alternative theory not presented to the Board on the original hearing. The refusal of the court below to remand is not in conflict with any decision of this Court or of any other circuit court of appeals, and it raises no question of importance.

Moreover, the court below was clearly correct in refusing to remand. The reason for the request to remand was to give the taxpayer an opportunity to prove that he suffered the loss of his equity in the property through foreclosure of a mortgage. The petition filed in the Board shows that the mortgagee commenced foreclosure proceedings in March 1934, that a receiver for the property was then appointed, and that a judgment of foreclosure and sale was entered in February 1935 (R. 9). The taxpayer testified that he lost the property through foreclosure in 1935 (R. 60) and the Board so found (R. 22). In these circumstances, it seems clear

that the taxpayer's loss of his equity occurred in 1935, after the taxable year, and that the court below, therefore, correctly refused to remand the case for further evidence on this point.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

NOVEMBER 1940.

U. S. GOVERNMENT PRINTING OFFICE : 1940